IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. .....

LEON KARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITON FOR A WRIT OF CERTIORARI OUT OF TIME
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner, Leon Karp, respectfully prays that a Writ of Certiorari issue, out of time to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on 4 December 1974.

Opinions Below

The Court of Appeals for the Ninth Circuit entered its opinion in this case on 4 December 1974. A copy of the opinion, affirming the judgment of conviction is attached as Appendix A.

Additionally, the opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. McCormick*, entered on 17 July 1974, the holding of which is critically important to the merits herein, is not yet reported. A copy of the opinion appears in Appendix B. hereto.

Jurisdiction

As aforestated, the judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A.) was entered on 4 December 1974. On 26 December 1974, a petition for rehearing of the cause en banc was filed, albeit in untimely fashion. On 3 January 1975, Petitioner's Motion To Recall the Mandate and Motion To File Late Petition For Rehearing was filed; on 28 February said dual motions were denied. The jurisdiction of this Court is involved under Title 28 U.S.C. §1254(1); §1651(a).

This Petition for a Writ of Certiorari is herewith filed out of time due to the inordinate length of time Petitioner's Motions To Recall the Mandate and File Late Petition for Rehearing were pending with the Court of

Appeals. Although this Petition for Certiorari, then, was not filed within the thirty days allowed by Rule 22(2) of the Supreme Court Rules, this limitation is not jurisdictional (*Heflin v. United States*, 358 U.S. 415, 418, n. 7, 3L.Ed.2d 407, 410, 79 S.Ct. 451 (1959)), and Petitioner prays to this Court's sense of fairness and enlightened judicial discretion which was similarly exhibited in *Taglianetti v. United States*, 394 U.S. 316, 22 L.Ed.2d 302, 89 S.Ct. 1099 (1969), to grant this Petition and consider the important questions posed by this case

Questions Presented For Review

We have before this Court a purely legal question, to which there is attached potential consequences of grave constitutional dimension, which may lead to a future divergence of appellate court decisions unless reviewed and resolved by this Court. Concisely framed, the questions presented in light of the undisputed record are:

1. Whether the opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. McCormick* (Exhibit B.), stated new principles of constitutional law or merely applied existing rules to a novel factual setting, in holding that the warrant requirement of the Fourth Amendment of the Federal Constitution applies to automobile seizures effected pursuant to 49 U.S.C. §782.

2. Whether the United States Court of Appeals for the Ninth Circuit, in *United States v. Karp* (Exhibit A.), correctly interpreted the *McCormick* decision, or whether the opinion in *Karp* is based upon a misunderstanding of *McCormick's* language, thereby rendering the entire discussion of the concept of retroactivity in *Karp*, irrelevant.

3. Whether the rules announced in *Carroll v. United States*, 267 U.S. 132 (1925) and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) are necessarily controlling and dispositive of the issue in *McCormick*, thereby mandating a reversal of the judgment in *Karp*, which premised its affirmance of the district court on the fact that the rule of *McCormick* departed from previous constitutional principles and should have prospective application only.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Fourth Amendment to the United States Constitution and the provisions of Title 49 of the United States Code, sections 781 and 782 are printed as Appendix C. hereto.

Statement of the Case

On 1 April 1974, Petitioner was convicted in the United States District

Court for the Central District of California of unlawfully possessing with the intent to defraud counterfeit notes and negatives from which counterfeit notes had been printed, in violation of 18 U.S.C. §§472 and 474. At trial, Petitioner's defense included the argument that the evidence against him had been obtained by an unlawful warrantless seizure of his automobile. The Court of Appeals for the Ninth Circuit, on Petitioner's direct appeal, affirmed the conviction. Although agreeing with Petitioner that the warrantless seizure of his automobile and subsequent search thereof had been effected in a manner violative of his Fourth Amendment rights, the appellate court nevertheless based its affirmance of the judgment of conviction on its recently decided opinion in *United States v. McCormick* ..... F.2d ..... (9th Cir. July 17, 1974) and held that *McCormick* should be given prospective application only. It is not disputed that the appellate court in *Karp* found that the warrantless seizure was conducted without probable cause and without exigent circumstances by Secret Service agents.

REASONS FOR GRANTING THE WRIT

A.

Petitioner respectfully urges that the uncontroverted factual matrix of the instant case, consisting of the warrantless seizure of Petitioner's automobile without probable cause and without exigent circumstances, fell squarely within the parameters of this Court's decision in *Carroll v. United States, supra,* 267 U.S. 132 and *Coolidge v. New Hampshire, supra,* 403 U.S. 443, which decisions must necessarily be held dispositive of the questioned legality of said seizure.

In affirming the district court's judgment, the Court of Appeals, in fact, held that the facts herein were indistinguishable from those in *United States v. McCormick,* No. 73-2252 (9th Cir. July 17, 1974) (Exhibit B.), wherein the appellate court held that the warrant requirement of the Fourth Amendment applied to automobile seizures effected pursuant to 49 U.S.C. §782 (Exhibit C.).

There is nothing startling or novel in the statement that the Fourth Amendment's prohibition against "unreasonable searches and seizures" is shaped by the warrant clause, and thus that a warrantless seizure of private property, including automobiles, is per se "unreasonable" under the Fourth Amendment unless it comes within one of the few specifically established and well delineated exceptions. (*Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Katz v. United States,* 387 U.S. 347 (1967); *Cooper v. California,* 386 U.S. 58 (1967).)

In *McCormick, supra,* the Ninth Circuit held that the arresting and seizing officers should have obtained a search warrant before conducting the seizure and search of McCormick's automobile. Significantly, the *McCormick* court relied upon *Coolidge v. New Hampshire, supra,* 403 U.S.

443, and *Carroll v. United States, supra*, 267 U.S. 132, as the controlling authority for its ruling.

The relevant facts in the *Coolidge* decision are indistinguishable from those in *McCormick* as well as those in the instant case. This has never been doubted; indeed the appellate court in *Karp* acknowledged the same. (Exhibit A. at App. p. 2). Just as the factual circumstances in *Coolidge* and *McCormick* precluded the finding of the existence of any "specifically stated and well delineated exceptions" to the warrant requirement, so too, the Court below found, did the facts in *Karp* necessarily negate any finding of the existence of any such exceptions. This leads to a consideration of *Carroll*, also relied upon by *McCormick* as the basis for its holding.

It has been unquestioned since 1925 when this Court decided *Carroll*, that the warrantless seizure of automobiles is authorized only when both of two factors are present: first, the arresting officer is possessed with probable cause to believe that the automobile contains contraband, and secondly, that there are exigent circumstances associated with the automobile.

Again, it is not disputed by the appellate court below that there did not exist exigent circumstances sufficient to justify the warrantless seizure. (Importantly, the "automobile exception," as originally formulated by *Carroll v. United States, supra*, 267 U.S. 132, and religiously followed by its progeny, is justified solely upon the vagrant and mobile nature of an automobile which distinguishes it from a house, insofar as warrantless searches are concerned.)

The common denominator of all the "automobile exception" cases is the reasonable likelihood that the automobile, stopped on a highway or in a public place, would or could be moved, thereby rendering the opportunity to search to be fleeting. (*Chambers v. Maroney*, 399 U.S. 42, 51 (1970).) And, as attested to, acknowledged and relied upon by the *McCormick* and *Karp* court, absent such a reasonable likelihood that the subject automobile would or could be moved, the automobile exception is simply irrelevant.

Contrary to the opinion of the appellate court in *United States v. Karp*, the *McCormick* case stated no new principle of law, but merely applied existing principles to seizures effected pursuant to 49 U.S.C. §782. (Exhibit B. at App. p. 8-9). Indeed, a close reading of *McCormick* reflects reasoning similar to that in *Coolidge v. New Hampshire supra*, and *Carroll v. United States*, in the appellate court's disposition of the focal point for its holding: the absence of exigent circumstances to justify the utilization of the automobile exception to the warrant requirement.

Nevertheless, the Court of Appeals in *Karp* clearly misinterpreted the precise holding of *McCormick* by confusing that court's holding with its mere dictum. In so doing, the court below, perpetrated by its misconception of applicable judicial authority, held that *McCormick* was a case enunciating new constitutional principles which would be given prospective application only.

B.

Certain language from the appellate court's opinion must be respectfully drawn to this Court's attention:

> "We there (*McCormick*) held that the warrant requirement of the Fourth Amendment applies to a seizure for forfeiture as well as to a search; that automobile exception announced in *Carroll v. United States*, 267 U.S. 132 (1925) does not apply to such seizures unless (1) there was *probable cause to believe that the car seized was at the time of seizure* being used in a manner that subjected it to forfeiture, or (2) that exigent circumstances excused the failure to obtain warrant." (Exhibit A. slip op., at 2.) (*Emphasis added*)

Petitioner respectfully urges that such a statement will necessarily lead to a divergence of judicial opinion in its misconception of those well-founded principles stated by this Court and in its misunderstanding of *McCormick*.

Contrary to the foregoing passage, this Court has never stated in *Carroll* or elsewhere, that either probable cause or exigent circumstances is alone sufficient to justify warrantless seizures. The correct statement is, of course, to the contrary. (*Coolidge v. New Hampshire, supra*, 403 U.S., at 468.)

Additionally, and of more appropriate significance, the Court in *Karp* confused *McCormick's* holding and dictum by assuming that the probable cause requirement was held, in *McCormick*, to mean "probable cause to suppose that at the time of seizure it (the car) was transporting contraband" rather than the mere "probable cause to believe that the car had in the past been used to transport contraband." (Exhibit A. at App. p. 2).

Although this Petitioner has, throughout his appeal, urged for the adoption of such an interpretation of the probable cause requirement, believing the same to be rudimentary in our system of criminal justice, the *McCormick* opinion cannot be cited as itself standing for that principle. In fact, the court in *McCormick* brushed aside the opportunity to rule on this point, stating and observing only that probable cause was satisfied under the express language of section 782. (Exhibit B. at App. p. 10). Indeed, there is further evidence for this proposition in the *McCormick* court's conclusion that 49 U.S.C. §782, which is silent on the question of whether a warrant is required and which also relates that seizure is justified when a car "has been or is being used" to transport contraband, is not unconstitutional on its face. (Exhibit C.)

Accordingly, while *McCormick* seemingly acknowledges that the seizing officers were not possessed with probable cause to believe that the car was being used to transport contraband at the time of the seizure, this is clearly not the basis for the court's holding; instead, the court therein *assumed* there was probable cause sufficient to satisfy section 782, but found that the second *sine qua non* of *Carroll*, exigent circumstances, was missing. As

such, the warrantless seizure was held to be unconstitutional. (See Exhibit B. at App. p. 10, 12).

Nevertheless, in affirming the judgment of the District Court, the Court of Appeals in *Karp* held that the decision in *McCormick*, because its facts were "indistinguishable," was necessarily controlling, that the rule announced in *McCormick* stated new principles of law, and that *McCormick* should be given prospective application.

In seeking a Writ of Certiorari out of time, this Petitioner respectfully submits that the ruling in *Karp*, relative to the sole issue of prospective application, constitutes a miscarriage of justice. The opinion in *Karp*, not only is based upon a misconception and misconstruction of *McCormick*, but also ignores the existence of rules announced in *Coolidge* and *Carroll*, which permeate the reasoning of *McCormick* and thus control the result in *Karp*.

It is submitted that *McCormick* stated no novel principle of constitutional law or broke any well-established line of judicial precedent. *McCormick's* limited holding is that there did not exist exigent circumstances surrounding the warrantless seizure. By its own language, it invokes the fundamental governing seizures of automobiles established since *Carroll*, in 1925.

Secondly, *McCormick* acknowledged the existence of the problem regarding the meaning of probable cause, caused by the confusing language of Section 782, without taking a position thereon.

Thirdly, *Karp's* decision that *McCormick* stated new constitutional principles, is premised on the misconstruction of the language of *McCormick* that said latter opinion breathed a new meaning into the concept of probable cause. Since no new definition of probable cause appears in *McCormick*, if any new or novel principles have been injected into the construction of probable cause, it is the opinion in *Karp*, *albeit* based upon a misunderstanding of *McCormick's* dictum, that must be viewed as the "new" decision. Under such an interpretation, it could not be denied that petitioner must receive the benefit of said new principle. To hold otherwise would allow the court below to announce an advisory opinion. (*Stovall v. Denno*, 388 U.S. 293, 301 (1967).)

Fourthly, even if *McCormick* can, by some stretch of judicial imagination, be interpreted as holding that warrantless seizures of automobiles conducted pursuant to section 782 must be based on probable cause to believe that the car contains contraband at the time of seizure, despite the language of the authorizing provision, Petitioner respectfully contends that such a construction is neither startling nor is it a departure from existing law, originally conceived by this Court in *Carroll*, thereby rendering the entire judicial discussion in *Karp* relative to the concept of retroactivity irrelevant.

C.

A final reason for granting this petition lies in the fact that on 15 October 1974, this Court granted certiorari in *Bowen v. United States*, 43 U.S.L.W. 3208 (No. 73-6848); the court below relied on its own earlier opinion in *United States v. Bowen*, 500 F.2d 960 (1974) which held that the application of this Court's opinion in *Almeida-Sanchez* to fixed checkpoints would be a new rule and would be applied prospectively only, for the proposition that *McCormick* stated new rules to be applied also prospectively only.

Significantly, the lower court in *Bowen* had adopted a somewhat more liberal test as to what constitutes "new law," than what has been set forth in prior decisions of this Court.

The court in *Bowen* announced that the test of a "new rule" consists of recognizing that the particular decision must either overrule clear past precedent or disrupt a practice long accepted and widely relied upon. As noted in footnote 1 in Part II of the Court's opinion, (slip op., at 25) this Court has not yet formulated a single threshold test as to the definition of a "new rule" in all cases.

Petitioner submits that a fairer test, especially in view of the circumstances of this case, would include, in the least, the concept that the case in question concerns "an issue of first impression whose resolution was not clearly foreshadowed." (*Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971).)

It is urged that a consideration of this difficult jurisprudential problem be embraced by this Court in view of Petitioner's contention that *McCormick's* conclusion did not cause a sharp break with prior law, but was only an application of principles announced in *Carroll* and *Coolidge*. In this vein, Petitioner further urges adoption of Circuit Judge Hufstedler's reasoning, dissenting in *United States v. Bowen, supra*, wherein she states that disturbing consequences attach when the doctrine of retroactivity is considered when new law is announced by courts other than the Supreme Court. "To extend the concept to embrace the law of the circuits would turn confusion into chaos."

CONCLUSION

In view of the foregoing, Petitioner accordingly and respectfully urges that *McCormick* constituted merely an interpretation and articulation of the existing constitutional law of *Coolidge* and *Carroll*, and an application thereof to the unique facts and circumstances inherent in seizures effected pursuant to 49 U.S.C. §782. In the endless and continuing development of judicial response to problems relative to the privacy of individuals, it is inevitable that novel factual settings will constantly evolve. But in reply to conflicts thereby produced, the courts do not necessarily announce new con-

stitutional law; rather, they apply basic legal principles to these warranting circumstantial problems. Petitioner urges recognition that this is such a case.

Petitioner respectfully submits that certiorari be granted to review the decision of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

PAUL CARUSO
Attorney for Petitioner

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LEON KARP,
Defendant-Appellant.

No. 74-1911

OPINION

[December 4, 1974]

On Appeal from the United States District Court
for the Central District of California

Before: MERRILL and GOODWIN, Circuit Judges,
and WOLLENBERG,* District Judge.

MERRILL, Circuit Judge:

On this appeal from convictions of possession of counterfeit notes under 18 U.S.C. §472 and negatives for the making of counterfeit notes under 18 U.S.C. §474 the sole contention is that the notes and negatives were discovered in an unlawful search and should have been suppressed. We affirm.

In May, 1973, the Secret Service learned from a convicted manufacturer and distributor of counterfeit notes that he had given $20,000 worth of counterfeit notes to Leon Karp, the defendant. On July 24, 1973, an individual matching defendant's description made a purchase at a sporting goods store and offered a counterfeit note as payment. The clerks observed defendant leave the store and noted the license plate number of the automobile in which he drove away. They apprised the Secret Service of the occurences and gave it the counterfeit note and the license plate number.

The Secret Service traced the license number through the Department of Motor Vehicles to the defendant. On July 26 the Secret Service went to defendant's place of business and found his car in the parking lot. They waited nearby and observed defendant enter the car. At this point, without any warrant, they arrested defendant and seized the car pursuant to 49 U.S.C. §782. The defendant was removed to a Secret Service vehicle. The agents then drove defendant's automobile to the Federal Building where an inventory of the vehicle revealed counterfeit notes in the glove compart-

*Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California, sitting by designation.

ment. The vehicle was then locked. Later that day special agents returned to complete the inventory and discovered 15 negatives for making counterfeit notes in a box on the back seat. On one of these negatives the defendant's left palm print was found.

If the seizure of the automobile without warrant was valid then the subsequent search was valid under *Cooper v. California*, 386 U.S. 58 (1967). The question is whether seizure without warrant was valid under 49 U.S.C. §782. Under facts which we do not find distinguishable from those at bar, this court in *United States v. McCormick*, ... F.2d ..... (9th Cir. 17, 1974), has held that seizure without warrant under §782 was not a reasonable seizure under the Fourth Amendment. We there held that the warrant requirement of the Fourth Amendment applies to a seizure for forfeiture as well as to a search; that the automobile exception announced in *Carroll v. United States*, 267 U.S. 132 (1925), does not apply to such seizures unless (1) there was probable cause to believe that the car seized was *at the time of seizure* being used in a manner that subjected it to forfeiture, or (2) that exigent circumstances excused the failure to obtain warrant.

Like *McCormick*, this case presents neither of those two factors. While there was probable cause to believe that the car had in the past been used to transport contraband, and that it was therefore subject to seizure under §782, there was no probable cause to suppose that at the time of seizure it was transporting contraband. Nor were there exigent circumstances justifying the warrantless search. Here as in *McCormick* the officers had ample time to secure a warrant after they acquired probable cause to believe the car was subject to forfeiture. There was no need for immediate action either to secure the car for foreiture proceedings or to search its interior. Under *McCormick*, then, lack of warrant was not excused.

The United States contends, however, that the rule of *McCormick* should be applied only to seizures conducted after July 17, 1974, the date of announcement of the rule. We agree.

The threshold question bearing upon the issue of prospective application of a rule under *Linkletter v. Walker*, 381 U.S. 618 (1965), is whether the decision states new principles of law or merely applies what has always been the law. In our view new principles are stated in *McCormick*.[1] The

[1] This seems to be acknowledged by the opinion itself. We there distinguished *United States v. Arias*, 453 F.2d 641 (9th Cir. 1972), upon the ground that the car in that case was, at the time of seizure, "being used to facilitate the consummation of a crime," *McCormick* slip opinion at page 4, and further stated:

> "Our other decisions, *Lockett v. United States*, 9 Cir., 1968, 390 F.2d 168; *Kaplan v. United States*, 9 Cir., 1967, 375 F.2d 895; *Browning v. United States*, 9 Cir., 1966, 366 F.2d 420, and *Burge v. United States*, 9 Cir., 1965, 342 F.2d 408, were all decided before the decisions of the Supreme Court in *Coolidge v. New Hampshire, supra; Chimel v. United States*, 1969, 395 U.S. 752; *United States v. Robinson*, 1973, [414] U.S. [218] (Dec. 11, 1973); and *Almeida-Sanchez v. United States*, 1973, 413 U.S. 266. *To the extent that any of our cases can be read as holding that,*

question remains whether these new principles should have retroactive application.

In *Stovall v. Denno*, 388 U.S. 293 (1967), the United States Supreme Court indicated that, whenever the question of retroactive application of a new law is before the court, three criteria should be considered:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

388 U.S. at 397. This tripartite test was reiterated in later Supreme Court decisions, *Michigan v. Payne*, 412 U.S. 47, 51 (1973), and was most recently adopted by this circuit in *United States v. Bowen*, 500 F.2d 960, 975, *cert. granted*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974) (No. 73-6848).

First with regard to the purpose to be served by the new rule, we note that as a rule bearing on search and seizure it doe not go to the fairness of a trial or the integrity of the fact-finding process, and in no way impairs the court's ability to determine the defendant's guilt or innocence, and that rules of this sort generally should not be applied retroactively. *United States v. Bowen, supra*, 500 F.2d at 977-78.

Applying the second of the *Stovall* criteria (namely, "the reliance by law enforcement authorities on the old standards,") to the case at bar, it would seem that retroactive application is not warranted. Clearly, the law enforcement officers in the present case had probable cause to believe appellant's automobile had been used to transport counterfeit money. Since they were thus justified in seizing appellant's automobile under 49 U.S.C. §782, there was no reason under then existing rules of law for the officers to believe they must first secure a warrant. No decision of this circuit had so indicated and other circuits had upheld similar seizures. *See United States v. Stout*, 434 F.2d 1264 (10th Cir. 1970); *United States v. Trotta*, 401 F.2d 514 (4th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *United States v. Francolina*, 367 F.2d 1013 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); *United States v. Troiano*, 365 F.2d 416 (3d Cir.), *cert. denied*, 385 U.S. 958 (1966); *Drummond v. United States*, 350 F.2d 983 (8th Cir. 1965), *cert. denied*, 384 U.S. 944 (1966); *cf. United States v. McKinnon*, 426 F.2d 845 (5th Cir.), *cert. denied*, 400 U.S. 868 (1970).

> *in every case, a car can be seized under 49 U.S.C. §782 without a warrant, so long as probable cause exists, they no longer state good law, for reasons considered hereafter."*

United States v. McCormick, slip opinion page 4. We explained the change wrought by *Coolidge* by noting that although *Cooper* would seem to uphold the validity of the seizure along with the subsequent search, the Court in *Cooper* "did not pass on the legality of the original seizure of Cooper's car." Slip opinion at page 3. *Coolidge* was then quoted as indicating that the Supreme Court would limit the rule of *Cooper* to cases in which the seizure was "unquestionably legal." This reinterpretation of *Cooper* was the basis for our re-examination of our line of cases which either had not discussed, as in *Lockett*, *Kaplan*, and *Browning*, or had rejected, as in *Burge*, a requirement that warrant be secured before seizure for forfeiture.

The third criterion to be employed in determining the question of retroactivity is the effect which the new pronouncement will have on the administration of justice. If *McCormick* were to be applied retroactively to all seizures made before July 17, 1974, the consequences to the orderly administration of justice would undoubtedly be widespread.

We conclude that the rule of McCormick should have prospective application only. Under prior law of this circuit, *Kaplan v. United States*, 375 F.2d 895, 899-900 (9th Cir.), *cert. denied*, 389 U.S. 839 (1967); *see Howard v. United States*, 423 F.2d 1102, 1103 (9th Cir. 1970), affirmance of the district court would have called for.

Accordingly judgement is affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT C. McCORMICK,
Defendant-Appellant.

No. 73-2252

[July 17, 1974]

On Appeal from the United States District Court
for the Northern District of California

Before: DUNWAY and WALLACE, Circuit Judges, and EAST,* District Judge

OPINION

DUNIWAY, Circuit Judge:

McCormick was convicted of conspiring to make, possess, sell and otherwise deal in counterfeit Federal Reserve notes, in violation of 18 U.S.C. §§371, 471, 472 and 473.

On February 17, 1972, McCormick was arrested at his Mountain View, California, home, pursuant to an arrest warrant. When Secret Service agents arrived to make the arrest, they parked in McCormick's driveway, blocking egress for his automobile, a blue Buick Riviera, which was in the driveway. Between fifteen minutes and one hour after McCormick's arrest, a Secret Service agent drove the Buick to the sub-basement parking garage of the Federal Office Building in San Francisco. The next day another Secret Service agent searched the car and discovered an enlarged photographic negative of a treasury seal. No warrant was obtained either to seize the car on February 17 or to search it on February 18. McCormick's pre-trial motion to suppress this evidence found in his car was denied. On appeal, he argues, *citing Coolridge v. New Hampshire*, 1971, 403 U.S. 443, that the Secret Service *agents should have obtained a search warrant before the seizure and search of his car. We agree* and therefore reverse this conviction.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

I. *The question presented.*

The government justifies its seizure and later search of McCormick's automobile solely on the basis of *49 U.S.C. §872*, which provides, in pertinent part, that "[a]ny . . . vehicle . . . which has been or is being used in violation of any provision of setcion 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited. . . ."

49 U.S.C. §781 provides, in part:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband articles in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband articles in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange or giving away of any contraband article.
>
> (b) As used in this section, the term "contraband article" means—
>
> * * * * *
>
> (3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation of other security.

We do not doubt that, if the seizure of the car on February 17, 1972, was valid, the later search on February 18, 1972 was also valid. *Cooper v. California*, 1967, 386 U.S. 58. There, California police officers seized Cooper's car when they arrested him on a narcotics charge. The seizure of the car was pursuant to Cal. Health and Safety Code §11611, which provides that any officer making an arrest for a narcotics violation shall seize any vehicle used to store, conceal, transport, sell or facilitate the possession of the narcotics. The officers searched the car where it was stored one week after the seizure, and the evidence seized was introduced at Cooper's trial. The search was upheld. The rationale is as follows:

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car — whether the State had "legal title" to it or not — was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being detained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the

> police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz*, 339 U.S. 56, 66. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding. *Id.* at 61-2.

Assuming the validity of the initial initial seizure under 49 U.S.C. §872, we think that this rationale would be applicable to the later search.

However, as the Supreme Court has later made clear, the Court in *Cooper* did not pass upon the legality of the *original seizure* of Cooper's car. Apparently that question was not presented in the case. *Coolidge v. New Hampshire, supra*, points out that *in Cooper the Court did not rule on the validity of the statute authorizing the seizure:*

> In *Cooper*, the seizure of the petitioner's car was mandated by California statute, *and its legality was not questioned*. The *case stands for the proposition that, given an unquestionably legal seizure, there are special circumstances that may validate a subsequent warrantless search.* 403 U.S. at 464, n.21 (emphasis supplied).

We have several times upheld searches of vehicles seized under 49 U.S.C. §782. But none of our cases prevents our now considering the constitutional validity of the seizure in this case.

In *United States v. Arias*, 9 Cir., 1972 453 F.2d 641 we upheld a subsequent search of a seized car where Arias' car was seized at the time of his arrest and the officers *knew, at that time*, that the car was being used to facilitate the consummation of a crime (453 F.2d at 643). The case falls within the automobile exception to Fourth Amendment requirements, discussed *infra*.

Our other decisions, *Lockett v. United States*, 9 Cir., 1968, 390 F.2d 168; *Kaplan v. United States*, 9 Cir., 1967, 375 F.2d 895; *Browning v. United States*, 9 Cir., 1966, 366 F.2d 420, and *Burge v. United States*, 9 Cir., 1965, 342 F.2d 408, were all decided before the decisions of the Supreme Court in *Coolidge v. New Hampshire supra; Chimel v. United States*, 1969, 395 U.S. 752; *United States v. Robinson*, 1973, ... U.S. ..... (Dec. 11, 1973); and *Almeida-Sanchez v. United States*, 1973, 413 U.S. 266. To the extent that any of our cases can be read as holding that, in every case, a car can be seized under 49 U.S.C. §782 without a warrant, *so long as probable cause exists*, they no longer state good law, for reasons considered hereafter.

For similar reasons, we consider it unnecessary to discuss cases from other circuits, dealing with seizures and searches under 49 U.S.C. §782.[1] Only one of them, *United States v. Stout, supra*, n.1, is a post *Coolidge* case, and it, *like our Arias case, can be supported under the automobile exception to Fourth Amendment requirements.*

II. *The Fourth Amendment applies.*

We therefore turn to the validity of the seizure of McCormick's car. We start with the proposition that the Fourth Amendment applies equally to searches and to seizures. It provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." This guarantee interposes between citizens and the police a magistrate whose objective evaluation must weigh the "right of the people to be secure" against the need to enforce the law. "When the right of privacy must reasonably yield to the right of search [and seizure] is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States*, 1948, 333 U.S. 10, 14.

A search and seizure question therefore begins with the proposition that "the most basic constitutional rule in this area is that 'searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions.' " *Coolidge v. New Hampshire, supra*, 403 U.S. at 454-55, quoting *Katz v. United States*, 1967, 387 U.S. 347, 357. Unless a warrantless search or seizure meets one of these exceptions, the evidence thereby obtained is inadmissible at trial. *Weeks v. United States*, 1914, 232 U.S. 383.

The fact that the agents made the seizures and search pursuant to an *act of Congress* does not remove that seizure and search from the purview of the *Katz per se* rule. *Unless the statute itself falls within one of the exceptions to the warrant requirement,* it *must yield to the right to be secure against searches and seizures.* This is clear from the Supreme Court's decision in *Almeida-Sanchez v. United States, supra*, in which the government's sole justification for a warrantless search of an automobile was a federal statute authorizing the search. The Court held that a statute cannot justify an otherwise unconstitutional search:

> Since neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case, we are left simply with

[1] *See, e.g., United States v. Francolino*, 2 Cir., 1966, 367 F.2d 1013; *United States v. Troiano*, 3 Cir., 1966, 365 F.2d 416; *United States v. Trotta*, 4 Cir., 1968, 401 F.2d 514; *Drummond v. United States*, 8 Cir., 1965, 350 F.2d 983; *Ted's Motors v. United States*, 8 Cir., 1954, 217 F.2d 777; *United States v. Stout*, 10 Cir., 1970, 434 F.2d 1264; *Sirimarco v. United States*, 10 Cir., 1963, 315 F.2d 699.

> the statute that purports to authorize automobiles to be stopped and searched, without a warrant and "within a reasonable distance from any external boundary of the United States." It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. 413 U.S. at 272.

In *Howard v. United States*, 9 Cir., 1970, 423 F.2d 1102, we held that evidence found in a search of a car that was purportedly seized under 49 U.S.C. §782 should be suppressed. Reversal was for lack of probable cause, and the usual Fourth Amendment tests were applied.

With this background *we scrutinize both Section 782 and the seizure to determine whether it falls within an exception to the warrant requirement.*

III. *The incident to arrest exception does not apply.*

The search of McCormick's automobile does not qualify as a search incident to arrest, viz. a "search of the area within the control of the arrestee." *United States v. Robinson, supra,* ..... U.S. ..... (slip op. at 5). We assume that the arrest of McCormick inside his house was valid, so that the first condition of a warrantless search incident to arrest is met. *Coolidge, supra,* 403 U.S. at 455.

The leading case in this area is *Chimel v. California*, 1969, 395 U.S. 752, which limits a search incident to arrest to the arrestee's person and "the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The justification for this exception to the warrant requirement is that the police have the

> need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as . . . the need to prevent the destruction of evidence of the crime — things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. *Preston v. United States*, 1964, 376 U.S. 364, 367.

These justifications are absent here. Four Secret Service agents and two local police officers raided McCormick's house and immediately placed him under arrest and handcuffed him; his car remained outside in the driveway. Under no circumstances could the car be considered under his "immediate control." *Coolidge v. New Hampshire, supra,* 403 U.S. at 456-57. *See also Preston v. United States, supra.*

IV. *The automobile exception does not apply.*

The seizure of McCormick's Buick also fails to qualify under the automobile exception to the warrant requirement, which was first announced in *Carroll v. United States*, 1925, 267 U.S. 132. In *Carroll*, the Court upheld

a federal statute authorizing the warrantless search of an automobile if the arresting officer had probable cause to believe that the automobile was "in the act of" transporting illegal liquor. *Id.* at 144. The Court has read *Carroll* to hold that

> a search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained . . . [T]he opportunity to search is fleeting . . . *Chambers v. Maroney*, 1970, 399 U.S. 42, 51.

The justification for a warrantless search and seizure under these circumstances rests on the

> necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, *where it is not practicable to secure a warrant* because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. *Carroll v. United States, supra*, 267 U.S. at 153 (emphasis added).

Carroll thus authorizes warrantless seizures of automobiles when two factors are present.

1. The arresting officer has probable cause to believe that the automobile contains contraband, and

2. There are exigent circumstances associated with the automobile.

Assuming the officer has probable cause, Carroll does not allow him to seize any automobile, but *only those automobiles which are movable* and *for which "it is not practicable to secure a warrant." Id.* "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire, supra*, 403 U.S. at 461-62.

We therefore proceed to examine the facts in the present case and *the statute* pursuant to which McCormick's Buick was seized, *to determine whether the above two factors were present* to authorize a warrantless automobile seizure.

A. *Probable cause.*

Our examination of the record leads us to conclude that at the time McCormick's car was seized the officers had probable cause to believe that the car [*had been* used in the manner denounced in §781, and so was subject to forfeiture under §782.] [However, there was no probable cause to believe it was being so used at the time of seizure.] [This, however, does not end the matter; as we have seen, probable cause alone does not justify a warrantless seizure.]

B. *Exigent circumstances.*

Although the agents had probable cause to believe that McCormick's car had been used to transport contraband, the second *sin qua non* of *Carroll*, exigent circumtsances, is here absent. On this aspect of the case, the facts are nearly identical to those of *Coolidge:* Secret Service agents learned that McCormick's Buick had been used to transport contraband two and one-half months before the seizure of the car. The car was parked in the driveway of his house when it was seized and there was no indication that it was *then* being used for any illegal purpose.[2] All that the agents had reasonable cause to believe was that it *had been* so used. Six officers entered the house to arrest McCormick, and he was quickly handcuffed. Moreover, even if he could have gained access to his car, he could not have driven it away, because a police car was blocking the driveway. *In Carroll and Coolidge terms, this automobile more resembled a house than a moving or mobile vehicle. Because there were no exigent circumstances at the time of the seizure, the later search cannot be justified under Chambers v. Maroney, supra. "[N]o amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances,'" Coolidge v. New Hampshire, supra,* 403 U.S. at 468, and *so the seizure here does not fall within the automobile exception* to the warrant requirement.[3]

V. *The plain view exception does not apply.*

The seizure of McCormick's car cannot be justified under the "plain view" exception of the warrant requirement, which allows the police to seize evidence or contraband in plain view without a warrant. *Coolidge v. New Hampshire, supra,* places limits on the doctrine. "[P]lain view *alone* is never enough to justify the warrantless seizure of evidence. . . . [E]ven where the object is contraband, . . . the police may not enter and make a warrantless seizure." 403 U.S. at 468 (emphasis original). The Secret Service agents here had ample opportunity to obtain a valid warrant. They knew the automobile's exact description and had probable cause to believe over two months before the seizure that it had been used to transport contraband. In this sense, the present case governed by *Coolidge* and the plain view exception therefore cannot authorize the seizure of the automobile.

The *Coolidge* Court did, however, emphasize that it was not faced with "a case involving contraband. . . ." *Id.* at 472. Can the government argue that Section 782 declares McCormick's automobile itself to be contraband and therefore subject to seizure without a warrant if found in plain view? We think not. There is a difference between the possession of, let us say, narcotics (*see United States v. Jeffers,* 1951, 342 U.S. 48, 54) or an illegal still (*see Trupiano v. United States,* 1948, 334 U.S. 699, 710) and the possession

[2] *See also Coolidge v. New Hampshire, supra,* 403 U.S. at 461, N.18.

[3] *See also United States v. Conolly,* 9 Cir., 1973, 479 F.2d 930, 935: "For the automobile exception to apply, the government must show that at the time of the warrantless search the officers had reason to believe that the mobility or exposure of the car made it impractable to seek a warrant."

of an automobile (*see One 1958 Plymouth Sedan v. Pennsylvania*, 1965, 380 U.S. 693). Possession of the former is always illegal; it is contraband *per se*. Possession of an automobile, on the other hand, is not always illegal; it is *derivative* contraband, and only its illegal use makes its possession illegal:

> Both *Trupiano* and *Jeffers* concerned objects the possession of which, without more, constitutes a crime. The repossession of such *per se* contraband by Jeffers and Trupiano would have subjected them to criminal penalties. The return of the contraband would clearly have frustrated the express public policy against the possession of such objects....
>
> It is apparent that the nature of the property here, though termed contraband by Pennsylvania, is quite different. There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss. . . . Furthermore, the return of the automobile to the owner would not subject him to any possible criminal penalties for possession or frustrate any public policy concerning automobiles, as automobiles. This distinction between what has been described as contraband *per se* and only derivative contraband has indeed been recognized by Pennsylvania itself in its requirement of mandatory forfeiture if illegal liquor, and stills, and only discretionary forfeiture of such things as automobiles illegally used. . . . We, therefore, do not have a case before us in any way analogous to the contraband involved in *Jeffers* and *Trupiano* and these cases can in no way be deemed to impair the continued validity of *Boyd* [*v. United States*, 1886, 116 U.S. 616] which, like this case, involved property not intrinsically illegal in character. *One 1958 Plymouth Sedan v. Pennsylvania, supra*, 380 U.S. at 699-700. (footnotes omitted)

Because McCormick's automobile is not contraband *per se*, *Coolidge* is still in point and the seizure of the automobile is not justified under the "plain view" exception to the warrant requirement. The seizure of the automobile was therefore unconstitutional and so was the subsequent search. The photographic negative of a treasury seal thereby obtained should have been suppressed.

Unlike the statute in Almeida-Sanchez, supra, 49 U.S.C. §782 *is silent on the question of whether a warrant is required.* The statute is not *unconstitutional on its* face; a warrantless seizure made pursuant to it which can be *independently justified under an exception to the warrant requirement would not be unconstitutional.* We merely hold that before seizing an item of derivative contraband under Section 782, the agent must first obtain a valid warrant except in circumstances which qualify as an exception to the warrant requirement. *See Melandez v. Schultz*, 365 F.Supp. 1205 (D.Mass. 1973).

The judgment of conviction is reversed and the case is remanded for further proceedings consistent with this opinion.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

I agree with the majority that if the seizure of the car was valid, the subsequent search was also valid. But I do not feel at liberty to find the seizure invalid. The majority concludes that *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), requires us to suppress the evidence. However, the *Coolidge* Court was never presented with the possibility of a lawful warrantless seizure pursuant to a forfeiture statute and probable cause. The majority seems to read *Coolidge* as excluding such a result simply because the *Coolidge* Court did not mention forfeiture seizures as an exception to the warrant requirement. This construction assumes that the Court was dealing with all possible exceptions whether or not they were in issue in that case. I cannot concur with such an interpretation.

I believe this case is governed by *United States v. Arias*, 453 F.2d 641, 642-43 (9th Cir. 1972), a post-*Coolidge* case, where we affirmed a similar seizure and search. The majority's attempt to distinguish *Arias* on the basis that the search *could* have been upheld on the basis of the automobile exception does not change the fact that there our court did not do so. The only issue facing us in *Arias* was whether the officers had probable cause to believe that the car had been used to facilitate the transportation of contraband. Arias had argued that " 'the facts of this case clearly bring it within the ruling of Howard v. United States, 423 F.2d 1102 (9th Cir. 1970),' that the forfeiture provisions of 49 U.S.C. §§781 and 782 cannot vindicate a vehicular search where seizing officers are without 'probable cause. . . .' " 453 F.2d at 643. We distinguished the facts in *Arias* from the facts in *Howard* because the officers had good reason to believe that Arias had used the car in violation of the law. We affirmed Arias' conviction, holding that where the officers have probable cause to believe that the automobile has been used to facilitate the transportation of contraband, a warrantless search following a seizure pursuant to 49 U.S.C. §§781 and 782 is valid.

The majority apparently argues that the search in *Arias* was valid not because it was conducted with probable cause that the forfeiture statute had been violated, but because the officers had probable cause and exigent circumstances. If there were exigent circumstances in *Arias*, however, we did not discuss them nor base our holding upon them. Indeed, the *Arias* fact situation indicates that if there were ever exigent circumstances, they no longer existed at the time that the officers conducted the search. Arias had employed a woman to drive a load car from Mexico to her home in Los Angeles. The contraband was discovered at the port of entry and the driver agreed to cooperate in apprehending Arias. The woman drove the load car to her home where she and customs officials waited for Arias to pick up the car. When Arias arrived, he left his station wagon parked at the woman's home and proceeded to drive the load car down the street. Apparently

recognizing that he was under surveillance, he returned to the woman's home where he was arrested. There is no indication that he was either in the station wagon or attempting to flee at the time of his arrest. The logical inference is that he was either in the load car or had just gotten out of it.

The station wagon was seized and taken to a federal facility where it was subsequently searched. It is clear from the case that the search was conducted pursuant to the forfeiture statute. We stated:

> "Although a cursory weapons search of Arias' station wagon yielded negative results, a more thorough probe, pursuant to 49 U.S.C. §§781 and 782, conducted at a federal facility on Terminal Island disclosed a quantity of red seconal capsules and "marihuana debris" lodged in the vehicle's left rear quarter panel.

453 F.2d at 642-43 (footnotes omitted). There was no warrant for the search and apparently no warrant for the seizure. There were no exigent circumstances justifying the seizure other than the usual concern that an ally might move the car after the officers had left. Once the station wagon had been taken to the federal facility, there was no possibility that the evidence would be destroyed. *We upheld the search on the ground that once the officers had probable cause for the seizure, the subsquent search was reasonable under the Fourth Amendment. We did not rely upon any other justification for the search or seizure.*

The fact situation in this case is indistinguishable from *Arias*. The officers had probable cause to believe that McCormick had used the Buick to transport contraband. The officers seized the car and drove it to the federal office building where it was subsequently searched. If there were exigent circumstances present in *Arias*, then there were also exigent circumstances present in this case. Unless we are to overrule *Arias*, we are compelled to uphold the search of McCormick's car.

The majority would require a warrant for the seizure and search in this situation because McCormick, following his arrest, could not have gained access to his car. Thus, they conclude, it "more resembled a house than a moving or mobile vehicle." Such a theory appears to me to be inconsistent with the recent teachings of a Supreme Court plurality in a case factually distinguishable but close enough to provide enlightenment:

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view . . . . [I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.

EXHIBIT C.

FOURTH AMENDMENT

TO THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

49 USC §781. Unlawful use of vessels, vehicles, and aircrafts; contraband article defined

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband article" means —

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Act or any regulation issued pursuant thereto; or

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

Aug. 9, 1939, c. 618, § 1, 53 Stat. 1291; Aug. 9, 1950, c. 655, 64 Stat. 427.

49 U.S.C. §782. Seizure and forfeiture

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further*, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. Aug. 9, 1939, c. 618, §2 53 Stat. 1291.

PRINTER'S ERRATA

All emphasis in the McCormick opinion (Exhibit B) other than that expressly noted by the McCormick court, is the result of notations on the slip opinion made by counsel for Petitioner preparing for oral argument below, and which were inadvertently included by the printer.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1192

LEON KARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 508 F.2d 1122.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1974. On February 28, 1975, the court of appeals denied petitioner's motion to file an untimely petition for rehearing. The petition for a writ of certiorari was filed on March 19, 1975, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *United States* v. *McCormick*, 502 F.2d 281 (C.A. 9), which applied Fourth Amendment warrant requirements to seizures of property subject to forfeiture, should be given retroactive application by the Ninth Circuit.

2. Whether the court below properly construed its prior decision in *United States* v. *McCormick, supra.*

3. Whether *Carroll* v. *United States*, 267 U.S. 132, or *Coolidge* v. *New Hampshire*, 403 U.S. 443, prohibits the warrantless seizure, with probable cause, of a vehicle for forfeiture to the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution and 49 U.S.C. 781 and 782 are set out in Pet. App. 15-16.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on both counts of an indictment charging the possession of counterfeit Federal Reserve notes and plates suitable for printing counterfeit notes, in violation of 18 U.S.C. 472 and 474. He was sentenced to a term of three years' imprisonment.

1. On July 24, 1973, petitioner entered a sporting goods store and made a small purchase, giving the store clerk a $20 bill (Tr. 105, 114-115).[1] Noticing that the bill was counterfeit, the clerk detailed another employee to follow

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[1] "Tr." refers to the reporter's official transcript of petitioner's trial. "R.A." refers to the record lodged with the court of appeals.

petitioner from the store (Tr. 115-116). The employee observed petitioner getting into a gold colored Cadillac and took down the vehicle's license number (Tr. 102-103, 110). This information was given to the Secret Service, which found that the Cadillac was registered to petitioner (Tr. 72).

On July 26 Secret Service agents drove to petitioner's place of business, observed petitioner's 1968 gold Cadillac parked nearby (Tr. 71-72) and placed the vehicle under surveillance. Approximately 25 minutes later, a man matching the description of the person who had passed the counterfeit note emerged from the building, entered the Cadillac, and started the engine (Tr. 73, 239). The agents arrested petitioner and seized his vehicle pursuant to the forfeiture statute, 49 U.S.C. 782 (Tr. 73-74; R.A. 15). There was probable cause to believe the vehicle was subject to forfeiture because of its use in petitioner's counterfeiting activities; there was not, however, probable cause to believe that, at the moment of its seizure, it was being so used (see Pet. App. 2).

A Secret Service agent impounded the Cadillac. While making an inventory of the vehicle's contents he discovered a wallet in the glove compartment (Tr. 74). The wallet contained 56 counterfeit Federal Reserve notes, 34 of which were similar to the note passed at the sporting goods store (Tr. 74-75; R.A. 15-16). During a more thorough search of the car, a number of negatives used in the printing of counterfeit notes were discovered in a box in the back seat (Tr. 76-77; R.A. 16). Both the counterfeit notes and the printing paraphernalia were admitted into evidence at petitioner's trial.

2. On July 17, 1974, the Ninth Circuit decided *United States* v. *McCormick*, 502 F.2d 281 (Pet. App. 5-14). Overruling prior Ninth Circuit precedent, the court of appeals in *McCormick* held that the Fourth Amendment requires officers to obtain a warrant prior to seizing a vehicle for forfeiture to the United States. The court below declined to apply *McCormick* retroactively to petitioner's case (Pet. App. 2-4).

ARGUMENT

1. Petitioner argues that the rule enunciated in *McCormick* should be applied retroactively. This question is relevant only within the Ninth Circuit. Ordinarily it is for the court of appeals to determine the meaning and applicability of its own precedents. There is, therefore, no question of general applicability requiring review by this Court. In any event, the decision of the court of appeals is correct.

The decision of a court usually should be accorded prospective application if the court has announced "a new principle of law * * * [which] overrul[es] clear past precedent on which litigants may have relied" (*Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106).[2] Under this test the decision below is correct; the court expressly discarded prior cases, concluding that "they no longer state good law" (*McCormick, supra*, 502 F.2d at 285).

Moreover, *McCormick* represented a departure from principles long accepted by other courts of appeals. This Court has recognized the special legal status of property subject to forfeiture (*United States* v. *Stowell*, 133 U.S. 1, 16-17) and has distinguished between seizures for the purpose of forfeiture and seizures for gathering evidence

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[2]Petitioner contends (Pet. 7) that the definition of a "new rule" contained in *United States* v. *Bowen*, 500 F.2d 960, 975 (C.A. 9), certiorari granted, 419 U.S. 824 ("the decision must either (1) overrule clear past precedent or (2) disrupt a practice long accepted and widely relied upon"), conflicts with the definition in *Chevron Oil Co., supra*. But the court below did not allude to or rely upon the *Bowen* definition, and by either definition it could properly conclude that *McCormick* announced a new rule.

(*Boyd* v. *United States*, 116 U.S. 616, 623). All other courts of appeals to consider the matter have held that no warrant is required to seize a vehicle for forfeiture. *United States* v. *Troiano*, 365 F.2d 416, 418-419 (C.A. 3), certiorari denied, 385 U.S. 958; *United States* v. *Trotta*, 401 F.2d 514, 516 (C.A. 4), certiorari denied *sub nom. Genovese* v. *United States*, 394 U.S. 908; *United States* v. *McKinnon*, 426 F.2d 845, 849-850 (C.A. 5), certiorari denied, 400 U.S. 868; *United States* v. *White*, 488 F.2d 563, 564-566 (C.A. 6); *O'Reilly* v. *United States*, 486 F.2d 208, 210-211 (C.A. 8), certiorari denied, 414 U.S. 1043; *United States* v. *Stout*, 434 F.2d 1264, 1266-1267 (C.A. 10). The holding in *McCormick* therefore was "a clear break with the past" (*Desist* v. *United States*, 394 U.S. 244, 248) that "effected a decisional change in attitude" from one that had long prevailed (*Gosa* v. *Mayden*, 413 U.S. 665, 673).

This Court has consistently recognized that the Fourth Amendment would not be served by retroactive application of the exclusionary rule, which is a "procedural weapon that has no bearing on guilt" (*Linkletter* v. *Walker*, 381 U.S. 618, 638). The *McCormick* rule "is calculated to prevent, not to repair. Its purpose is to deter [future conduct] * * * by removing the incentive to disregard" the constitutional guarantee (*United States* v. *Calandra*, 414 U.S. 338, 347 (quoting *Elkins* v. *United States*, 364 U.S. 206, 217)). The prophylactic rule created by *McCormick* could not affect conduct that had occurred prior to its announcement, and consequently should be applied prospectively only. *Linkletter* v. *Walker, supra*, 381 U.S. at 637.

2. Petitioner also contends that the court below failed properly to interpret its earlier decision in *McCormick* This is a matter to be resolved within the court of appeals, and presents no conflict among the circuits requiring consideration by this Court.

3. Petitioner finally contends that the Ninth Circuit's decision in *McCormick* was compelled by this Court's prior decisions in *Carroll* v. *United States*, 267 U.S. 132, and *Coolidge* v. *New Hampshire*, 403 U.S. 443, so that the proper date for "retroactivity" analysis was the date of decision of *Coolidge*. But the plurality opinion in *Coolidge* does not support such an argument; *Coolidge* involved a search of a car for the purpose of gathering evidence, and the car was, at the time of its search, in the driveway of the defendant's home. Here, by contrast, the Secret Service agents seized petitioner's car from a public place for forfeiture to the United States. Under 49 U.S.C. 782, when a car has been used for certain purposes its title vests in the United States, and the Secret Service agents therefore were seizing property which, they had probable cause to believe, was the property of the United States.[3] If they were incorrect, and were interfering with a legitimate proprietary interest of petitioner, that interference could be rectified in subsequent judicial proceedings. In *Coolidge*, however, the interference was with defendant's privacy interest, and rectification at a later date would be difficult if not impossible. This Court has never invalidated a probable cause seizure of a vehicle from a public place, and it therefore is not accurate to contend that *Coolidge* either compelled or foreshadowed the result in *McCormick*. Cf. *Cardwell* v. *Lewis*, 417 U.S. 583; *Cady* v. *Dombrowski*, 413 U.S. 433, 446-447; *Chambers* v. *Maroney*, 399 U.S. 42, 51-52.

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[3]Once the agents had properly seized the vehicle for forfeiture, they were entitled to conduct an inventory search and to make use of any contraband or evidence discovered. *Cooper* v. *California*, 386 U.S. 58.

CONCLUSION

For the foregoing reasons it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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